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IN THE

Supreme Court of the United States

No. 351. **October Term, 1935.**

TERMINAL WAREHOUSE COMPANY (Plaintiff-Appellee in the Court Below),
Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY and MERCHANTS WAREHOUSE COMPANY (Defendants-Appellants in the Court Below),
Respondents.

Brief for Respondents in Opposition to the Petition for Writ of Certiorari.

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No. 351. October Term, 1935.

TERMINAL WAREHOUSE COMPANY (PLAINTIFF-APPELLEE IN THE COURT BELOW),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY AND MERCHANTS WAREHOUSE COMPANY (DEFENDANTS-APPELLANTS IN THE COURT BELOW),

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The reasons assigned by petitioner for granting a writ of certiorari rest upon an erroneous conception of the decision of the Third Circuit Court of Appeals and an unwarranted gloss of the facts. After giving a brief history of the case, respondents will first discuss the sole ground upon which the judgment was reversed and thus demonstrate that no reason exists for the allowance of an appeal. Respondents will then answer the new and unsound reasons advanced in support of the petition.

I. CONCISE STATEMENT OF THE CASE.

Petitioner complained to the Commission that it had been injured by Railroad's payment to Merchants of an allowance for the handling of inbound and outbound freight, which allowance petitioner claimed enabled Merchants to

grant customers forty-eight-hour handling service and thus cut normal warehouse charges with a resultant diminution of petitioner's normal business profits; and prayed for a "cease and desist" order and reparation (Defs. Ex. 12; R. 455-456, 494-497). After full hearings, the Commission granted the order and directed Railroad to stop the allowances and cancel its tariff provisions under which the facilities of Merchants were made a part of Railroad's station facilities (R. 476-485); but denied the claim of reparation in a Report, holding in part (R. 484-485):

> "*Complainants confine the basis of their claim for reparation to damages resulting from shrinkage or diminution of their normal business profits.* They urge that they be permitted to submit proof of actual pecuniary loss at a further hearing to be held subsequent to the decision herein, contending that it would be impracticable to make such proof prior to the date the unjust discrimination and undue prejudice is removed. We are not inclined to this view. *Complainants have been accorded ample opportunity to present facts supporting an award of reparation. Their case must stand or fall on the facts now of record. The evidence is far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices.* Damage must be shown with certainty to support an award of reparation under findings of unjust discrimination or undue prejudice. Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, 206. Reparation is denied." (160 I. C. C. 563, 568-569.) (Italics supplied.)

Following the Commission's denial of reparation, petitioner brought the present action, alleging that respondents had combined and conspired to destroy Terminal's warehousing business in order to acquire a monopoly of Phila-

delphia's warehousing business for Merchants and the complementary transportation business for Railroad (R. 9-15). At trial, the claim of damages was limited to an alleged loss of profits arising from the shrinkage or diminution of Terminal's charges below its normal rates, which shrinkage or diminution petitioner attributed to Merchants' forty-eight-hour free handling service pursuant to the allowances paid by Railroad (R. 188-201, 234-238). Petitioner's proofs were practically the same as before the Commission and were founded upon the several contracts between Railroad and Merchants, under which the allowances were paid in consideration for the free handling of certain warehouse freight and Merchants' facilities became a part of Railroad's station facilities.

The trial judge and petitioner conceded that the damages claimed in the present action and awarded by the jury were the same damages that the Commission had denied (R. 603, 604, 606); and this was affirmed by the Circuit Court of Appeals (R. 662-663). Judge Dickinson stated in his opinions sur Motion for a New Trial (R. 603, 606):

> ". . . It may be noted that the damages sought to be recovered in the conspiracy action are the same damages which, under the ruling of the Commission, might have been awarded by it."
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> . . . . . .
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> "3. As we have said *the controlling question is whether the plaintiff having asked for and been given an award by the Interstate Commerce Commission can recover the same damages under the Sherman Act.* The fact that the award was negative makes no difference.
>
> "The experienced counsel for plaintiff, having the courage of his convictions, has frankly made two admis-

sions. *He admits that the plaintiff made claim before the Commission for reparation, which included the same damages which the jury awarded, and further admits that if the Commission had the jurisdictional power to award the damages allowed by the jury, the plaintiff cannot recover in the instant case.*" (7 Fed. Supp. 484, 487, 488.) (Italics supplied.)

Circuit Judge Thompson succinctly compared petitioner's evidence before the Commission and the District Court, stating (R. 662-663):

> "In the action before the Commission, the complainants produced documentary evidence that the subsidized warehouse companies cut or shrunk normal warehouse charges by affording free distribution of warehouse freight. They also produced testimony that the rebates, which took the form of allowances, enabled the subsidized warehouse companies to give free service; that the rebates were used to the detriment of the complainants; and that the combination fixed the market value of the warehouse service in Philadelphia. In the action before the District Court, Terminal produced testimony that Merchants made no charge for goods handled during the forty-eight hour free period and collected no demurrage for car detention, whereas Terminal had to pay for car detention as well as for construction and maintenance of side tracks to its warehouses; that Terminal had to charge its costs for handling in-bound and out-bound freight, and could not compete with Merchants' offer of free service because it received no railroad allowance; that, as a result, Terminal could not handle heavy density products and had to reduce its rates on light density products; and that reduced charges, made necessary by the alleged unfair competition, were less by $536,278.35 than the normal rate would have netted Terminal.

"We conclude that the testimony upon which Terminal relied to prove damages in the District Court was substantially identical with that upon which it relied to prove damages before the Commission." (Italics supplied.)

The trial judge held that the Commission lacked jurisdiction to award the damages recovered in the present action and therefore decided that the Commission's denial of those damages did not bar the present action (R. 605-611). On appeal, the Circuit Court of Appeals determined that the Commission had jurisdiction to award such damages and reversed upon the sole ground that the present action was barred by the prior proceedings before the Commission (R. 663-665).

II. ARGUMENT.

In concluding that the Commission had jurisdiction to award the damages claimed and that the Commission's denial thereof precluded the recovery of the same under the Sherman Act, the Circuit Court of Appeals but followed the law of this Court so that there is no special and important reason for granting a writ of certiorari. Moreover, the reasons assigned by petitioner are unsound and contrary to its position in the courts below. They will be discussed in order.

A. Damages denied by the Commission are not recoverable in a subsequent action under the Sherman Act.

This Court has repeatedly declared that the findings of the Commission as to reparation are judicial in nature and final; and that damages denied by the Commission are not recoverable in any other court or tribunal. Where, as here, a complainant elects to proceed before the Commis-

sion invoking not only its administrative jurisdiction (as shown by the "cease and desist" order) but also its judicial jurisdiction to give full damages by way of reparation, that complainant has had his day in court before a tribunal of his own selection and will not be permitted to seek elsewhere the damages denied by the Commission. The finality of the Commission's denial of damages and the consequent barring of subsequent actions for the same was applied by Mr. Justice Cardozo in *Interstate Commerce Commission v. United States,* 289 U. S. 385 (1933), which case is cited and followed by Circuit Judge Thompson (R. 663). The following language is from the opinion of this Court (pp. 388, 394):

> ". . . The respondent by its complaint to the Commission invoked this dual jurisdiction, the administrative jurisdiction to prescribe a rule for the future (Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285, 291; Baltimore & Ohio R. R. Co. v. Brady, 288 U. S. 448), and the judicial or quasi-judicial jurisdiction to give reparation for the past. Baltimore & Ohio R. R. Co. v. Brady, supra. *In dismissing such a complaint, the Commission speaks with finality. Its orders purely negative—negative in form and substance—are not subject to review by this court or any other.* Standard Oil Co. v. United States, 283 U. S. 235; Alton R. Co. v. United States, 287 U. S. 229; Procter & Gamble Co. v. United States, 225 U. S. 282; Baltimore & O. R. Co. v. Brady, supra. *Damages for discrimination denied by the Commission are not recoverable somewhere else.*
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> . . . . . .
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> *"The policy of the law has been to give finality to orders of the Commission negative in form and substance, and to keep them out of the courts.* Standard Oil Co. v. United States, supra; Alton R. Co. v. United

States, supra; Procter & Gamble Co. v. United States, supra; B. & O. R. Co. v. Brady, supra." (Italics supplied.)

Similar cases reaching a like result are *B. & O. R. R. Co. v. Brady,* 288 U. S. 448 (1933), at pp. 457, 458-459; *Standard Oil Co. v. United States,* 283 U. S. 235 (1931) at pp. 240-241; *Penna. R. R. Co. v. Clark Coal Co.,* 238 U. S. 456 (1915); *Markle Co. v. Lehigh Valley R. R.,* 271 Fed. 989 (1921) at p. 991; and *Hillsdale Coal & Coke Co. v. Penna. R. R.,* 237 Fed. 272 (1916) at p. 274.

Petitioner as well as the courts below admitted that the present action was barred under the above decisions, provided only that the Commission had jurisdiction to grant the damages it denied; and the controlling issue thus became whether or not the Commission under Sections 8 and 9 of the Interstate Commerce Act (49 U. S. C. A. 8-9) had authority to grant reparation for an alleged loss of profits (R. 606, 663). Compliant to the numerous decisions of this Court, Circuit Judge Thompson determined that the Commission was vested with that authority and accordingly reversed the judgment. In passing, it should be observed that before the Commission petitioner argued that there was jurisdiction to allow damages for an alleged shrinkage or diminution of normal profits on actual business transactions (R. 497); but took exactly the contrary position in the present action when the trial judge's first opinion of May 4, 1934, made it necessary (R. 598-604).

This Court has always construed Section 8 to authorize the recovery of consequential damages for injury to one's business including shrinkage or diminution or prevention of normal business profits. A leading case in point, which petitioner relied upon in the earlier proceedings and which the Commission adopted in its Report (R.

485, 497), is that of *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184 (1913), in which Justice Lamar defined the broad scope of the statutory term "full amount of damages" of Section 8 as follows (pp. 203-204):

> ". . . There was no proof of injury—*no proof of decrease in business, loss of profits, expense incurred or damage of any sort suffered*—the plaintiff claiming that, as matter of law, the damages should be assessed to it on the basis of giving to it the same rate, on all its tonnage, that had been allowed on any contract coal shipped, on the same dates, whether such tonnage was great or small.
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> . . . . . .
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> "If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. *The plaintiff, under the present statute, in any such case being then entitled to recover the full damages sustained;—*" (Italics supplied.)

In *Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288 (1916), Justice Holmes applied the same broad definition to the phrase "full amount of damages" and further held that an award of damages under Section 8 was conclusively presumed to include every item of damage attributable to the unlawful practices. He said (pp. 290-291):

> "The Court of Appeals decided that the Act to Regulate Commerce committed to the Interstate Commerce Commission only the granting of special relief against the making of an overcharge and that the satisfaction of the Commission's award still left open

an action in the state courts to recover what are termed general damages—such as are supposed to have been recovered in this case. In this we are of opinion that the court was wrong.

"By section 8 a common carrier violating the commands of the act is made liable to the person injured thereby 'for the full amount of damages sustained in consequence' of the violation. . . . The decisions say that whatever the damages were they could be recovered; Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184, 202, 203; Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412, 429; and that the statute determines the extent of damages. Pennsylvania R. R. Co. v. Clark Brothers Coal Mining Co., 238 U. S. 456, 472. *We are of opinion that all damages that properly can be attributed to an overcharge, whether it be the keeping of the plaintiff out of its money, dwelt upon by the trial court, or the damage to its business following as a remoter result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid.*

"If at a new trial the plaintiff can prove that the defendant unjustifiably refused cars or caused it other damage not attributable to the overcharge of freight, our decision does not prevent a recovery; but it is evident that the present judgment embraces elements that cannot be allowed." (Italics supplied.)

The many decisions in accord are cited in the opinion of the Circuit Court of Appeals (R. 663); and in the interests of brevity will not be repeated here.

Petitioner attempts to distinguish the *Louisville & Nashville R. R. Co.* case, *supra,* by quoting at length from the decision of the District Judge which was reversed on appeal. Our quotation from this Court's opinion un-

equivocally sets forth that all damages resulting from the alleged excessive charge were within the jurisdiction of the Commission and that subsequent resort to the courts as to such matters was not permitted. In the present action it was within the Commission's jurisdiction to award damages resulting not only from the allowances paid by Railroad to Merchants but also from the contractual arrangement whereby Merchants' warehousing facilities were made a part of Railroad's station facilities to the alleged prejudice of petitioner. Because petitioner failed to produce adequate proof of any such damages, the Commission refused an award.

It is submitted that in reversing the judgment of the trial court, the Circuit Court of Appeals properly followed the law of this Court to the effect that the Commission had jurisdiction to grant full reparation and that a negative order of the Commission barred the recovery of identical damages in a subsequent action under the Sherman Act. It therefore appears that the decision of that appellate court precludes the existence of any special and important reason for a review of the present case on a writ of certiorari.

B. Petitioner has advanced no reason for allowing a writ of certiorari.

Petitioner asks this Court to allow a writ of certiorari upon a number of allegations which have no foundation either in fact or law. The "Questions Presented" and the "Reasons for Granting the Writ", appearing on pages 6 and 7 of the Petition do not set forth any question of law arising in this case. They are, in fact, hypothetical questions bearing no relation to the record.

(1) Question of Commission's jurisdiction to award reparation against a non-carrier.

Petitioner consistently tries to make it appear that the decision of the Circuit Court of Appeals is based upon the supposed jurisdiction of the Commission to award joint damages against Railroad and Merchants. To substantiate this misinterpretation, a sentence is lifted out of the opinion of Circuit Judge Thompson and surrounded by a context wholly different from anything said in the opinion. This is so transparently disingenuous as to require no further comment.

A reading of the clear and succinct opinion is sufficient to refute the contention. It is squarely based upon the finding that petitioner has already had its day in court as against Railroad, and is now barred of an action to recover for the same injury in which Railroad is a joint defendant. Respondents at no time ever suggested that the Commission could have awarded reparation against Merchants. This can be seen by reference to respondents' Points for Charge in the trial of the case (R. 548-554), and to the Assignments of Error (R. 636-650).

It follows that the first "Question Presented" and the first "Reason for Granting the Writ" fail to state any question which need be considered by this Court.

(2) The present action cannot now be treated as an action solely against Merchants.

At pages 14 and 20 of the supporting brief, there are clear intimations that petitioner recognizes the force of the decision of the Circuit Court of Appeals, at least insofar as Railroad is concerned. Petitioner, however, argues that even though its claim for damages be barred as against

Railroad, yet it may still proceed against Merchants in the present action because it did not ask the Commission for reparation from Merchants and because the Commission could not have made any such award. Along the same line of reasoning, petitioner, at page 20 of its brief, suggests a supposititious case in which A's failure to recover damages for personal injury against B does not bar A of a subsequent suit against C.

By this argument petitioner hopes to overcome its voluntary admission in the courts below that if the Commission had jurisdiction to award damages against Railroad, the present action was barred (R. 606). It ignores the fact, of which petitioner can scarcely be ignorant, that the present suit is brought, not against a third party, but against Railroad and Merchants jointly. From the inception of the present action, they have been indissolubly joined together. The Statement of Claim avers that they and they alone combined and conspired against petitioner; and the proofs are directed entirely against the acts of both (R. 8-15, 137-250). The verdict and judgment are joint (R. 555, 629).

Heretofore, petitioner has never sought to separate them or their liability and has bottomed its cause of action upon the ground that the evidence proved that petitioner's injury had its source in the contractual arrangements between Railroad and Merchants and that there was direct causal connection between the allowances and the alleged damages. As petitioner once stated before the Commission "the record shows these powerful combinations of carrier and subsidized warehouse ally fixing the market value of warehouse service for the warehouse industry of Philadelphia" (R. 494). It is too late now to assert that the sole cause of injury was the intervening act of Merchants.

Under all the authorities cited herein as well as in the opinion of the Circuit Court of Appeals, the present action must fail, if recovery is barred against either joint respondent. It follows that the second "Question Presented" has no application to this case.

(3) The Commission's jurisdiction to award the reparation sought against Railroad.

Notwithstanding the unanimous decision of the Circuit Court of Appeals, and the decisions of this Court upon which it is based, petitioner contends that the Commission lacked jurisdiction to award reparation from Railroad for any loss sustained by petitioner in its business by reason of the payments made by Railroad to Merchants and found by the Commission to be illegal rebates. If petitioner's contention is sound, the Commission would be without jurisdiction to award reparation in any case of unlawful rebating or discrimination by a carrier, since in such cases the only recovery possible is the amount of loss occasioned by the favored shipper's taking advantage of his position to cut below market prices. The question need not be discussed, however, since this Court has repeatedly held that the Commission has power to award such reparation. *Penna. R. R. Co. v. International Coal Company,* 230 U. S. 184 (1913). *Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co.,* 242 U. S. 288 (1916). *Interstate Commerce Commission v. United States,* 289 U. S. 385 (1933).

In support of its contention with respect to the limited jurisdiction of the Commission, and in the face of the above authorities, petitioner has cited the following cases:

Southwestern Milling Company v. C. R. I. & P. Ry. Co., et al., 161 I. C. C. 291 (1930), in which reparation was asked

because of discrimination in rates, but denied by the Commission because there was no proof of injury to the complainant. The Commission held that it had jurisdiction to award the reparation asked if damages were proved, but that the complainant had failed to show that his favored competitors had taken advantage of their position to cut below the market price. Far from sustaining petitioner's contention, this decision directly opposes it.

E. C. Miles Lumber Co. v. C. B. & Q. R. R. Co., et al., 89 I. C. C. 761 (1924), in which reparation was granted for the refusal of the Railroad to accept freight at one of its stations. This case has no bearing on the question whatever.

Joynes v. P. R. R. Co., 17 I. C. C. 361 (1909), in which the Commission held that it had no jurisdiction to award damages in cases of rebates or discrimination by a carrier, and that jurisdiction to award reparation was limited to cases of unreasonable rates and overcharge by the carrier, in which case the excess charges could be ordered repaid. This decision was flatly overruled in *Jacoby v. P. R. R. Co.*, 200 Fed. 989 (1912), and in the above cited decisions of this Court. This case, therefore, lends no support to petitioner's contention.

To bolster its contention that the Commission lacked jurisdiction to award the reparation sought from Railroad, petitioner now alleges (page 4 of the Petition) that in the proceeding before the Commission the Railroad itself contended "that said damages could not be the subject of a reparation order under sections 8 and 9 of the Interstate Commerce Act". This allegation is utterly untrue, and is unsupported by anything in the record. Sections 8 and 9 of the Interstate Commerce Act were not referred to in the

complaint before the Commission (R. 451-456), although reparation was asked, nor was any issue made as to the application of these sections, nor reference made to them in the Answer of the Railroad (R. 468-469). The only issue in the proceeding was as to whether sections 2 and 3 of that Act had been violated by the arrangement between Railroad and Merchants; and, if so, whether the evidence disclosed, with sufficient definiteness to justify an award of reparation, that damage had resulted to the complainants from such violations. Railroad contended that there was no violation, but at no time contested the application of sections 8 and 9, or the Commission's jurisdiction to award reparation in case a violation of sections 2 and 3 were found (R. 486-511).

The following excerpts from the Petition for a Rehearing amply show that petitioner fully and competently argued the existence of the jurisdiction of the Commission to award the reparation sought—a matter in no way controverted by Railroad:

> (R. 494) "Uncontradicted documentary evidence shows that the subsidized warehouse companies cut, or shrunk, normal warehouse charges by affording free distribution of warehouse freight. Exhibits 6, 11, 42 to 51 inclusive. And the testimony is that the allowances, the rebates, enabled them to afford that free service. Rec. 635, 704. The evidence follows the rebates through the trade channels of the receivers of the rebates and shows actual use of the rebates by those receivers to the injury of the complainants, an exceptionally complete showing. The record shows these powerful combinations of carrier and subsidized warehouse ally fixing the market value of warehouse service for the warehouse industry of Philadelphia."
>
> (R. 497) "The shrinkage or diminution of normal business profits, as claimed by the complainants, is

based on actual and not theoretical business transactions, that is, it is based on actual business transactions which the complainants handled under the subnormal or 'cut' warehouse charges imposed by their subsidized competitors. Such curtailment or diminution of normal business profits is a foundation for reparation. Penna. R. R. Co. v. International Coal Company, 230 U. S. 184, 206; Cornell v. L. V. R. R., 57 I. C. C. 157, 163; Foster Lumber Co. v. V. & S. R. R. Co., 112 I. C. C. 651, 654; Puget Sound & Cascade Ry. Co. v. Director General, 91 I. C. C. 467, 470, 471. Damages also may be recovered for unlawful prevention of normal business gains. W. U. Tel. Co. v. Hall, 124 U. S. 444, 455."

The Commission refused reparation because petitioner had failed to produce sufficient evidence to warrant such an award. Petitioner correctly points out at the top of page 15 of its Brief that the Commission thus held that the *fact* of damage had not been proved. It is curious, therefore, that in the same paragraph, and elsewhere in the Petition and Brief, petitioner refers to this portion of the Commission's report as a finding that "the injuries" sustained by petitioner were not "attributable directly to the alleged unlawful practices". Petitioner thus endeavors to twist out of the words of the Commission a finding that injuries had been proved, but that they were not attributable to the Railroad. There is, of course, no warrant for such an interpretation. The finding was, on the contrary, that there was not sufficient proof of any injuries to warrant a recovery.

(4) The present action and the proceeding before the Commission are based on the same cause of action.

In the "Summary Statement of the Matter Involved", pages 2 to 5 of the Petition, and also 19 of petitioner's

Argument, it is alleged that the present suit under the Sherman Act differs substantially from the proceeding before the Commission under the Interstate Commerce Act, in that certain additional matters, namely, the maintenance of side-tracks by Railroad, freedom from demurrage charges, and the solicitation of business by Railroad for Merchants are here alleged as steps in the alleged conspiracy, but were not presented for the consideration of the Commission; and that the two suits are brought under different statutes. These contentions will be considered in turn.

The decision of the Commission (R. 476-485) shows clearly that, not only were the payments condemned, but that the Commission gave consideration also to the general relation between Railroad and Merchants and ordered Railroad to cancel its tariff provisions which made the facilities of Merchants a part of the station facilities of Railroad. Thus the Commission said (R. 485):

> "Defendants will therefore be required to cease and desist from publishing or making such discriminatory and preferential allowances. The Pennsylvania and the Baltimore & Ohio will also be required to cancel their tariff provisions which make the facilities of the contract warehouses a part of the respective station facilities of these defendants at Philadelphia." (160 I. C. C. 563, 569.)

The same fact also appears in the opinion of this Court which, describing the order of the Interstate Commerce Commission, said (283 U. S. 501 at pages 503-504):

> "The order required the Reading Company and the Pennsylvania and Baltimore & Ohio railroads, interstate rail carriers, to cancel such provisions in their tariffs as purported to make the warehouses of ap-

> pellants in Philadelphia a part of the station facilities of the carriers, and directed that they cease and desist from making allowances to appellants in connection with the loading and unloading of package freight at the latter's warehouses."

Following a full discussion of the status of the warehouses as station facilities (Pages 504-507), this Court reaches the conclusion:

> "We think, as the court below held, that the Commission's finding that appellants' warehouses are not in fact public freight stations, is supported by the evidence."

The suggestion in the Petition that other new matters are involved in this case (page 19), such as freedom from demurrage, free use of side-tracks, assistance in solicitation of business, is beside the mark since all these were incidents of the status which Merchants had under its contracts as the operator of stations of Railroad. In other words, demurrage could not be assessed on a car awaiting unloading by the Railroad's own agents, since demurrage is the penalty imposed upon the consignor or consignee for failure to unload within a reasonable time. Furthermore, Railroad would naturally provide and maintain the tracks at its own stations and would solicit business for movement to and from such points as against movement to or from competitive points.

In the proceedings before the Commission, as in the present action, the contracts between Railroad and Merchants constituted the basis of the attack, and the incidental features referred to above as new material interjected in this case, were, in no proper sense, either new material or matters of consequence. They were all inci-

dental to the underlying conception of the entire arrangement as embodied in the contracts, viz: that Merchants' warehouses constituted stations of Railroad, a relation which the Commission ordered discontinued, as indicated in the sentence above quoted.

Since the statement that no such matters were involved in the proceeding before the Commission finds no support in the present record, it is permissible for respondents to challenge the statement by a reference to the same contracts introduced in this case (R. 18-92, 411-415) which appear at pages 455 to 526 of the transcript of record in the *Merchants Warehouse Case,* 283 U. S. 501 (1931), the contents of which is summarized in *Merchants Warehouse Company v. United States,* 44 Fed. (2d) 379 (1930) at pages 381 and 386, and in 283 U. S. 501 (1931), at pages 504 and 509.

Moreover, even if these matters had not been before the Commission, petitioner would be foreclosed because, as held in *L. & N. R. R. v. Ohio Valley Tie Co.,* 242 U. S. 288, 291 (1916), they might have been made the basis of recovery under the challenge of the arrangement between Railroad and Merchants as a violation of Sections 2 and 3 of the Interstate Commerce Act (49 U. S. C. A. 2, 3) and of the Elkins Act (49 U. S. C. A. 41-43).

Furthermore, petitioner sought in this case to recover on account of the alleged advantage to Merchants in the securing of competitive business as a result of the allowances paid it, which was the basis of the principal part of the claim before the Commission. No effort was made to prove the portion of the damages due to what are suggested as the new matters here presented, but which were not new but implicit in the attack made on the Merchants' warehouses as the station facilities of the Railroad.

Petitioner's other contention, that an adverse decision upon a claim of reparation before the Commission in a proceeding under the Interstate Commerce Act, cannot bar a subsequent suit to recover treble damages under the Sherman Act, for the same alleged injury, must fall of its own weight. The argument proves too much. Under section 4 of the Clayton Act (15 U. S. C. A. 15) and under section 8 of the Interstate Commerce Act (49 U. S. C. A. 8) damages may be recovered by anyone who has been injured by reason of violation of the Sherman Act and Interstate Commerce Act respectively. No right of action is given unless there has been an injury—so that the injury is itself a part of the cause of action in each case. Where, as in the present case, the alleged injury is the same, it would follow from petitioner's argument that where both statutes have been violated the injured party could first recover full damages under the Interstate Commerce Act and then recover treble damages under the Sherman Act for the same injury. Such a duplication of right cannot be supposed to have been intended by Congress.

The result would be no different where damages have been denied in the first instance by the Commission. The aggrieved party having had his day in court is not entitled to bring suit for the same alleged injury under a different statute. As was said by Judge Thompson in writing the opinion of the Circuit Court of Appeals (R. 664):

> "Several statutory remedies were available to Terminal. It could have petitioned the Interstate Commerce Commission for an order directing the offending common carrier to cease and desist from the unlawful practices and for an award of damages; or it could have sued in the appropriate District Court for an award of damages or treble damages. It did not have the right,

however, to pursue each of the above remedies successively until such time as it found a tribunal which would award the damages sought. As we have already stated, Terminal did in fact petition the Interstate Commerce Commission for a cease and desist order, which was granted, and for an award of damages, which was denied. Terminal thereby elected its remedy, and is barred from subsequent action for the same damages."

In so holding, the Circuit Court of Appeals followed the decision of this Court in the case of *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156 (1922), in which suit was brought under section 7 of the Sherman Act for damages resulting from an unlawful conspiracy between several railroads to establish high rates, whereby plaintiff alleged he had been injured. The Commission had previously found that the rates were reasonable, but the plaintiff contended that the rates were higher than they would have been had there not been a conspiracy. Writing the opinion of the Supreme Court, Mr. Justice Brandeis said (260 U. S. at 162):

". . . Under section 8 of the latter (Interstate Commerce) act the exaction of any illegal rate makes the carrier liable to the 'person injured thereby for the full amount of damages sustained in consequence of any such violation' together with a reasonable attorney's fee. Sections 9 and 16 provide for the recovery of such damages either by complaint before the Commission or by an action in a federal court. *If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings.* Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co., 242 U. S. 288. *Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional rem-*

edy under the Anti-Trust Act? See Meeker v. Lehigh Valley R. R. Co., 162 Fed. 354. And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal, because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be legal and while in force had to be collected by the carrier?" (Italics supplied.)

The same doctrine was applied in *Glenn Coal Co. v. Dickinson Fuel Co., et al.*, 72 Fed. (2d) 885 (1934) (C. C. A. 4). There suit was brought under the Sherman Act for treble damages for an unlawful registration of a Trade Mark (alleged to be a step in a conspiracy in violation of the Sherman Act). The opinion was written by District Judge Chesnut, who said, citing the *Keogh case* as authority (72 Fed. (2d) at 888-889):

". . . We think it quite unreasonable to conclude that it was the intention of Congress in providing for three-fold damages in a civil suit for violation of the Anti-Trust Act to have intended to thereby give to a plaintiff in a case of this kind three-fold damages in addition to those given by the trade mark law, merely on the allegation that the registration was in furtherance of a conspiracy to violate the Anti-Trust Act. See Keogh v. C. & N. W. Rwy. Co., 260 U. S. 156, 162, 43 S. Ct. 47, 67 L. Ed. 183. Such a construction would necessarily extend the scope of the latter Act to cases beyond its fair import and make it possible to convert almost any and every trade mark controversy into a civil suit under the Sherman Act."

In the present case, petitioner has made its election to recover damages under the Interstate Commerce Act. If it had any cause of action whatever under the Sherman Act,

it was too late to bring such an action after an application for reparation under the Interstate Commerce Act had been made to the Commission, and action thereon taken by it. Petitioner endeavors to escape this result by arguing that the Commission had no jurisdiction to award reparation against Merchants, a non-carrier. Petitioner relies on the unfounded contention that the election to recover under one of the statutes is not an election at all, if damages are asked against only one of several possible parties who might be liable. However, such a side-stepping is clearly impossible, under the above authorities. Having elected to pursue its remedy under the Interstate Commerce Act, petitioner was restricted to recovery under that Act.

It is thus clear that there is no conflict between the decision of the Circuit Court of Appeals in the present case and the decisions of this Court and of other Circuit Courts of Appeal. The third "Question Presented" and the second "Reason for Granting the Writ" should be answered in the negative, and a writ of certiorari denied.

C. Respondents' additional complete defenses to the present action.

The judgment was reversed upon the sole ground that the prior proceedings before the Commission barred the present action. This rendered unnecessary a consideration of the other complete defenses raised by respondents. They were

(1) the Sherman Act does not provide an additional remedy for an alleged injury under the Interstate Commerce Act; (see Keogh v. C. & N. W. Ry. Co., 260 U. S. 156 (1922));

(2) A general warehouse business in Philadelphia is not interstate commerce and subject to the Sherman Act;

(3) no conspiracy in violation of the Sherman Act was shown; and

(4) the proofs failed to show any damage suffered by petitioner.

Respectfully submitted,

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